United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1205

No. 74-1205

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EMANUEL C. RUSSO,

Appellant

v.

LOCAL UNION 676 OF THE UNITED ASSOCIATION OF PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, et al.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES

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STATEMENT OF THE ISSUE

1. Whether the District Court properly dismissed the Complaint for failure to state a claim upon which relief can be granted, where the Complaint, seeking relief under Sections 101(a)(1) and 101(a)(5) of the Labor Management Reporting and Disclosure Act

alleged that foremen, supervisors and owners, all members of Local 676, participated in union affairs but failed to allege that Appellant, or any union member, has been discriminated against in his right to nominate and vote as provided in Section 101(a)(1).

2. Whether the District Court properly dismissed the Complaint for failure to state a claim upon which relief can be granted, where the Complaint, seeking relief under Sections 101(a)(1) and 101(a)(5) of the Labor Management Reporting and Disclosure Act alleged that the local union membership amended its by-laws and voted Appellant out of office because he had filed unfair labor practice charges with the NLRB, contrary to the desire of the local membership, but where there are no allegations of a deliberate and long-standing suppression of free speech within the union.

STATEMENT OF THE CASE

This case is before the Court on an appeal from an Order issued by Hon. Judge Jon O. Newman of the United States District Court, District of Connecticut dismissing Appellant's Complaint for failure to state a claim upon which relief can be granted. The District Court's Memorandum of Decision is reproduced in the Appellant's Appendix (A. 13-26).[1/]

1/ "A" references are to the Appendix to Brief submitted by the Appellant in this case.

STATEMENT OF FACTS

On January 8, 1974, Plaintiff-Appellant, Emanuel C. Russo, Business Manager of Defendant-Appellee Local 676, filed a Complaint and request for injunctive relief alleging infringement of rights protected by Sections 101(a)(1) and 101(a)(5) of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 411 (A. 6 at par. 26). Jurisdiction is invoked under Sections 102 and 103 of LMRDA, 29 U.S.C. §412 and §413 (A. 1 at par. 1).[2/]

Local 676 was chartered by the United Association in 1970 on condition that the local adopt a constitution and by-laws, a dues structure and nominate and elect officers in accordance with the provisions of the United Association Constitution for nomination and election of local union officers (Union App.23-24 [3/]). The United Association's Constitution does not provide that local by-laws be approved by the International Union, and, accordingly, the United Association did not review the Local 676 by-laws (Pl. Exh. A-1).[4/]

2/ The Complaint also alleges jurisdiction under 29 U.S.C. §501 but makes no other reference to Title V of the LMRDA. This reference was apparently erroneously added to Paragraph 1 of the Complaint (A. 1). Also, at the hearing on the preliminary injunction, Plaintiff withdrew reliance on Title IV of LMRDA as a basis for Federal District Court jurisdiction.

3/ References to "Union App." refer to the Appendix to the Union's Brief.

4/ References to "Exh." are to the exhibits as numbered by the District Court in the hearing on Preliminary Injunction.

On April 6, 1971, elections in the newly chartered local were held and officers were elected, including Mr. Russo, who was elected Business Manager for a three year term commencing April 6, 1971 (A. 14).

During 1973, the negotiating committee of Local 676, comprised of the Business Manager, the Local Union President and the Local Union Executive Board, as required by the local union's by-laws, conducted negotiations with the National Automatic Sprinkler and Fire Control Association, Inc. After agreement on a contract had been reached by the union negotiating committee and the employer association, but prior to ratification by the union membership, Mr. Russo protested to the local membership that the negotiating committee could not lawfully negotiate a contract because some members of the committee were supervisors. Thus any agreement reached would be invalid under the National Labor Relations Act (A. 14). The membership nevertheless ratified the contract in April, 1973 (A. 15). On April 12, 1973, Mr. Russo initiated unfair labor practice charges with the NLRB, complaining that supervisors had negotiated and voted to approve the contract (A. 15). As a result of this unfair labor practice charge, the members of Local 676 were denied the wage increase provided in the newly negotiated collective bargaining agreement, and, accordingly, the membership in May, 1973, adopted a resolution requesting Mr. Russo to cease all present and future interference with the negotiating committee's efforts to finalize

the new agreement "so that we [Local 676 members] can start receiving our retroactive pay" (Union App. 1-2). On October 4, 1973, the NLRB issued a complaint on the charge filed by Mr. Russo; however, the NLRB is reconsidering its decision to issue the complaint and, thus, no hearing date has yet been set (A. 15). To date the wage increase provided by the April, 1973 collective bargaining agreement had not been implemented.

On August 21, 1973, the union's recording secretary gave notice of a special meeting to amend the union's constitution and by-laws. The local constitution and by-laws at that time provided for nomination for union office in March and election in April. However, this provision conflicted with the United Association Constitution which requires nominations in either November or May and elections in either December or June. Since where such a conflict exists, the United Association Constitution preempts the local constitution, the "local constitution had to come in conformity with the UA [United Association] constitution . . . ." (Union App. 6). The changes in the local union constitution and by-laws, necessary to bring them into conformity with the United Association Constitution, were discussed at a membership meeting held on October 2, 1973, and Mr. Russo was given full opportunity to argue against the amendment (Union App. 10-11). The changes, however, were approved by the membership by a vote of 44-1. Nominations for all union offices were held on November 6, 1973, and election for these offices was held on

December 4, 1973.

Mr. Russo was nominated for the office of Business Manager and was afforded a full opportunity to campaign. Indeed, he utilized his office as Business Manager to send the membership literature, on local union stationery, regarding his position on the alleged ineligibility of certain members to vote, and reviewed, again, his protest of the nomination of officers in November. In this literature, he also informed the membership that he had filed a second unfair labor practice charge with the NLRB, protesting the nominations and informed the membership of his intention to protest the December election (Union App. 12-13,25-26). The membership, nevertheless, voted Mr. Russo out of office by a vote of 61-13 with 9 challenged votes of alleged supervisors and owners sealed and not counted with the approval of those challenged (Union App. 15).

On January 8, 1974, Plaintiff-Appellant filed this suit, as as noted, to inter alia enjoin the installation of the newly elected officers. A hearing was held on January 17, 1974 on Mr. Russo's motion for a preliminary injunction (A. 16). Mr. Russo presented extensive testimony and rested his case. However, in view of the legal issues presented, all parties agreed to suspend testimony by Defendants-Appellees, extend the temporary restraining order and permit Defendants-Appellees to file a motion to dismiss on the understanding that if the motion were denied, Defendants-Appellees would be afforded an opportunity to present evidence before a decision was reached on Plaintiff-Appellant's motion for a preliminary

injunction. Following the Defendant-Appellees' motion to dismiss, Judge Newman held that Mr. Russo had failed to state a claim upon which relief can be granted and dismissed the complaint. This Court ordered, on February 13, 1974, that the parties maintain the status quo and scheduled an expedited appeal of this matter.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED WHERE THE COMPLAINT, SEEKING RELIEF UNDER SECTIONS 101(a)(1) AND 101(a)(5) OF LMRDA, ALLEGED THAT FOREMEN, SUPERVISORS AND OWNERS PARTICIPATED IN UNION AFFAIRS BUT NOWHERE ALLEGED THAT APPELLANT OR ANY OTHER UNION MEMBER WAS DISCRIMINATED AGAINST IN HIS RIGHT TO NOMINATE AND VOTE AS PROVIDED BY SECTION 101(a)(1) OF LMRDA

As noted, the Plaintiff-Appellant's first cause of action concerns the claimed right to have a federal district court prevent named Defendants from taking union office following their election and declare owners and supervisors ineligible to participate in certain union affairs. This claim by Plaintiff-Appellant raises important issues concerning the respective functions of the Secretary of Labor, the Federal District Courts and the National Labor Relations Board in the administration of national labor policy. The critical question presented is not whether supervisory participation in union affairs is or is not against the national labor policy, but rather whether the Congress intended that issues concerning such supervisory

participation be litigated in the federal courts. We show below that a federal district court does not have jurisdiction under Section 102 of LMRDA, in these circumstances, to adjudicate the issues presented.

In order to establish federal court jurisdiction under Section 102 of LMRDA, Plaintiff-Appellant must, of course, state a claim under Title I of LMRDA upon which relief can be granted. In its Brief here, Plaintiff-Appellant alleges an infringement of the voting rights protected in Section 101(a)(1) of LMRDA (Appellant's Brief, pp. 14-19).

It is now well established that Section 101(a)(1) of LMRDA does not vest a federal district court with general authority to oversee fairness of union elections. Section 101(a)(1) guarantees "equal rights" to nominate, vote and participate in deliberations and voting. However, as the Supreme Court has made clear, "plainly this is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote" Calhoon v. Harvey, 379 U.S. 134, 139 (1964). Thus, the Court held in Calhoon v. Harvey that the plaintiff in the district court litigation had failed adequately to allege a Section 101(a)(1) claim where "The complaining union members have been denied no privilege or right to vote or nominate, which the union has granted to others. . . . Whether the eligibility requirements set by the union's constitution and by-laws were reasonable and valid is a

question separate and distinct from whether the right to nominate on an equal basis given by §101(a)(1) was violated" (379 U.S. at 139).

In the instant case every member in good standing is now permitted to vote and participate in union affairs on an equal basis. Appellant alleges no denial of any right protected by Section 101(a)(1) "which the union has granted to others". In short, Plaintiff- Appellant alleges no discrimination in voting rights within the meaning of Section 101(a)(1). It may be that ultimately the NLRB or the Labor Department will determine that participation in union affairs by certain union members is unreasonable or invalid but that is a question "separate and distinct" from the issue of whether the right to nominate and vote on an equal basis given by Section 101(a)(1) was violated. Thus, the District Court properly found that Plaintiff-Appellant has failed to state a claim upon which relief can be granted. See Schonfeld v. Penza, 477 F.2d 899 at 903-904 and n. 6 (2nd Cir. 1973) (no infringement on the "equal right" to nominate or elect where complaintants failed to allege they have been personally discriminated against); Navarro v. Gannon, 383 F.2d 512, 520 (2nd Cir. 1967) ("[T]he voting rights protected by Section 101(a)(1) must be directly attacked to warrant suit under Section 102"); Gurton v. Arons, 339 F.2d 371, 374 (2nd Cir. 1964) (the right to equality in voting was not violated even where an executive board of the union destroyed the effectiveness of a prior membership vote by arbitrarily voiding it after it was taken).

In its brief (pp. 13-14, 16-17), Plaintiff-Appellant argues that the effect of alleged supervisory participation in voting dilutes the voting strength of nonsupervisory members and, therefore, its claim here is cognizable under Section 101 (a)(1) because such result causes discrimination between two classes of members. The above analysis is both contrary to Calhoon, supra, and begs the critical issue in this case.

First, as noted supra, §101(a)(1), as interpreted by the Supreme Court is violated only where it is alleged that the union has denied rights to one class of members which it has granted to another class. Here the union has granted all members in good standing exactly the same rights - to participate equally in the affairs of the union. Indeed, the Plaintiff-Appellant's argument is indistinguishable from the interpretation of §101(a)(1) advanced and rejected in Calhoon v. Harvey, supra. For there, as noted, the Plaintiff failed to persuade the Supreme Court that the "equal rights" language in §101(a)(1) means that §101(a)(1) prohibits unreasonable limitations on the right to nominate even though the restrictions on the right to nominate are equally applied to all. Similarly, here, Plaintiff-Appellant claims that union rules regarding the alleged supervisors' right to vote are unreasonable and even though such rules are equally applied to all members the rule violates the "equal rights" language of Section 101(a)(1). The Supreme Court has simply rejected this notion.

Moreover, Plaintiff-Appellant's argument begs a basic issue.

His argument assumes that certain members are supervisors, that they are prohibited from union participation and that Congress intended the federal district courts to litigate this issue. We show next that contrary to Plaintiff-Appellant's assumption, Congress did not intend that the federal district courts should have primary jurisdiction to decide such eligibility issues.

The structure of the LMRDA shows that Congress did not intend federal district courts to involve themselves in questions regarding eligibility of supervisors to vote, to nominate and to hold office. Initially, it is plain that Title IV of LMRDA establishes a statutory scheme governing the election of union officers and the right to vote free from interference. Thus, Section 401(e) of Title IV (29 U.S.C. §481(e)) sets forth a member's right to a "reasonable opportunity" to nominate and to vote without "improper interference". Moreover, Section 402 of Title IV sets up an exclusive method for protecting Title IV rights by permitting individual members to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. See Calhoon v. Harvey, supra, 379 U.S. at 140. Indeed here Appellant has already initiated proceedings in this matter with the Secretary of Labor, and the Appellee union is cooperating in the Secretary's investigation. Thus, Plaintiff-Appellant has a remedy through Title IV, but more importantly, as the Supreme Court has pointed out, "It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary in order to best serve the public interest" Calhoon v. Harvey, supra, 379 U.S. at 140.

In this case, particularly, the special knowledge of the

Secretary of Labor is needed to balance the conflicting interests of the right to full participation in union affairs by members, on the one hand, and the need to protect against managerial influence in internal union affairs on the other. Thus, the instant matter involves potentially four classes of members: owners, superintendents of construction projects, working journeyman foremen (group leaders) who possess little or no indicia of supervisory authority, and journeymen who are not group leaders. In other words, the question is not simply whether supervisors should participate in union affairs, but rather (1) whether certain union members possess any supervisory authority based on applicable standards developed under the National Labor Relations Act, Section 2(11),[5/] and (2) of those members possessing some indicia of supervisory authority, what limitations on their participation in union affairs best serves the public interest and promotes a uniform labor policy? Under applicable NLRB precedent, for instance, the greater one's supervisory authority, the more such a supervisor is prohibited from participation in the internal union affairs of nonsupervisors. See Nassau and Suffolk Contractors Association, 118 NLRB 174 (1957). See also Local 636, Plumbers v. NLRB, 287 F.2d 354 (D.C. Cir. 1961). These issues thus require policy determinations that

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5/ "The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

must be uniformly applied. The Secretary of Labor has recently published guidelines prohibiting foremen, supervisors or contractors from being candidates for or to hold office.[6/] However, recognizing that in the construction industry, especially, members of unions may act as group leaders or perform limited supervisory duties, the Secretary's Guidelines state that cases involving such members will be decided on a case by case basis and the test will be

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6/ "§452.47 EMPLOYER OR SUPERVISOR MEMBERS. Inasmuch as it is an unfair labor practice under the Labor-Management Relations Act (LMRA) for any employer (including persons acting in that capacity) to dominate or interfere with the administration of any labor organization, it follows that employers, while they may be members, may not be candidates for office or serve as officers. Thus, while it is recognized that in some industries, particularly construction, members who become foremen, supervisors, or contractors traditionally keep their union membership as a form of job security or as a means of retaining union benefits, such persons may not be candidates for or hold office.[29] Whether a restriction on officeholding by members who are group leaders or others performing some supervisory duties is reasonable depends on the particular circumstances. For instance, if such persons might be considered 'supervisors' under the LMRA, their right to be candidates under the Act may be limited. Another factor in determining the reasonableness of a ban on such persons is the position (if any) of the NLRB on the status of the particular employees involved. If, for example, the NLRB has determined that certain group leaders are part of the bargaining unit, it might be unreasonable for the union to prohibit them from running for office. An overall consideration in determining whether a member may fairly be denied the right to be a candidate for union office as an employer or supervisor is whether there is a reasonable basis for assuming that the person involved would be subject to a conflict of interest in carrying out his representative duties for employees and rank and file union members.

[29] See Nassau and Suffolk Contractors' Association, 118 NLRB No. 19 (1957). See also Local 636, Plumbers v. NLRB, 287 F.2d 354 (C.A. D.C. 1961)."

(Section 452.47, Secretary of Labor's Statements of General Policy or Interpretations).

"whether there is a reasonable basis for assuming that the person involved would be subject to a conflict of interest in carrying out his representative duties for employees and rank and file union members".[7/] We submit that in view of the policy considerations that must be balanced in cases regarding supervisory participation in internal union affairs, in view of the several categories of alleged supervisors involved in the instant matter, and in view of the Congressional determination to utilize the "special knowledge and discretion of the Secretary of Labor in order best to serve the public interest" the Congressional scheme of LMRDA is best served in this case by holding that Plaintiff-Appellant has not made out a claim cognizable under Section 101(a)(1) to the extent he relies on that section to prohibit the installation of officers he claims are supervisors. Rather, the Congressional scheme and the promotion of uniform standards is better served by withholding federal court jurisdiction and requiring Plaintiff-Appellant to present his case to the Labor Department and/or the NLRB, as he already has done. See Robins v. Rarback, 325 F.2d 929 (2nd Cir. 1963) (refusal to find federal court jurisdiction under Section 101(a)(1) on a claim that members were deprived of an "effective vote" since the same claim can be made to the Secretary of Labor through Title IV).[8/]

7/ Id.

8/ The Supreme Court in San Diego Building Trades Council v. Garnon, 359 U.S. 236, 242-243 (1959) stressed the importance of developing a uniform national labor policy by confiding primary (continued)

II. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED WHERE THE COMPLAINT, SEEKING RELIEF UNDER SECTIONS 101(a)(1) AND 101(a)(5) OF LMRDA, ALLEGED THAT THE LOCAL UNION MEMBERSHIP AMENDED ITS BY-LAWS AND VOTED APPELLANT OUT OF OFFICE BECAUSE HE HAD FILED UNFAIR LABOR PRACTICE CHARGES WITH THE NLRB, CONTRARY TO THE DESIRE OF THE LOCAL MEMBERSHIP, BUT WHERE THERE ARE NO ALLEGATIONS OF A DELIBERATE AND LONG-STANDING SUPPRESSION OF FREE SPEECH WITHIN THE UNION

Plaintiff-Appellant's second cause of action concerns his claimed right to prevent his removal from office. In his complaint Plaintiff-Appellant relied on Sections 101(a)(1) and 101(a)(5) of LMRDA to support this claim for relief. As the court below found, however, "His factual allegations appear more designed to assert denials of a free speech right protected by §101(a)(2) or the right to initiate action before an administrative agency, protected by §101(a)(4)" (A. 20). In his brief, Plaintiff-Appellant now asserts denials of free speech rights protected by §101(a)(2) as well as denials of rights protected by §§101(a)(1) and 101(a)(5). (Appellant's Brief, pp. 22-26).[9] Defendant-Appellees certainly do not take legal

8/ (continued) jurisdiction to interpret and apply substantive rules of labor relations to a specific and specially constituted tribunal and thus avoid "incompatible and conflicting adjudications". See also Garner v. Teamsters Local 776, 346 U.S. 485, 490, 491 (1953). To be sure, Title I vests the federal courts with primary jurisdiction to decide matters involving violations of member's Title I rights, but the courts should hesitate to permit a plaintiff to avoid the procedures of Title IV by the expedient of sweeping into his right to sue under Title I claims which require the expertise of the Secretary of Labor and the uniform application of standards.

9/ Plaintiff-Appellant does not claim any infringement on Section 101(a)(4) rights.

exception to the failure to initially allege an infringement of Section 101(a)(2) rights as Defendant-Appellees have not been prejudiced thereby. For, in any event, the District Court correctly concluded Plaintiff-Appellant has failed to state a claim upon which relief can be granted.

Plaintiff-Appellant's initial failure to allege denial of §101(a)(2) rights does, however, focus on an important aspect of this case. As will be discussed more fully infra, Plaintiff-Appellant does not allege in his complaint that the act of the union membership in amending their by-laws to conform with the controlling provisions of the United Association's Constitution has suppressed free speech among the union membership or was part of any deliberate and long-standing policy to suppress free speech within the union. Thus, Plaintiff-Appellant's initial reluctance to rely on 101(a)(2) supports Judge Newman's finding that no such policy is alleged (A.22), and supports the conclusion that no suppression of free speech of the membership was intended or has resulted. Moreover, any assertion to the contrary by Plaintiff-Appellant in its brief is an afterthought, and more importantly, is merely a conclusionary allegation not supported by any factual allegation in the complaint.

The question of the Union's motivation in amending its by-laws is a factual issue that, of course, has not yet been fully litigated. The Defendant-Appellees assert here, for the record,

that the controlling motivation was a need to conform the local by-laws with the United Association Constitution. Mr. Russo's testimony during the hearing on his request for a preliminary injunction supports this view substantially (Union App. 3-10 [10/]). However, for purposes of a motion to dismiss, the Defendants-Appellees assume, as they must, that the nonconclusionary allegations alleged in the complaint are true. Thus, for the purpose of this argument, we assume that the union membership's amending their by-laws was notivated, in part, by a desire to remove Mr. Russo from office for filing unfair labor practice charges with the NLRB which resulted in the members being deprived of a wage increase provided by the April, 1973 collective bargaining agreement. We show below, however, that such action by the union members was not a violation of 101(a)(2) for the members merely exercised their franchise to vote a union officer out of office.

10/ The Plaintiff-Appellant also alleges throughout his brief that Local 676 is controlled by supervisors. Again for the record, we must state that this allegation is completely unfounded. The testimony at the hearing on the preliminary injunction shows that the first journeyman mechanic working on a construction job is designated the "foreman" whether he works by himself or with others and whether or not he has any supervisory authority (Union App.16-24). This factual issue is not now before the Court: It is before the NLRB and the Labor Department. However, in light of Plaintiff-Appellant's many unsupported assertions in its brief here, regarding supervisory interference and in light of Judge Newman's caution to Mr. Russo that he would discount his testimony regarding alleged supervisory authority of members where such testimony was merely Mr. Russo's unsupported conclusions, Defendants-Appellees feel the Court should be aware of our position in this regard.

Initially, it is plain that an underlying tenet of our democratic process is that the constituency must be permitted , periodically, to vote to affirm or disaffirm the conduct of the officials representing them. This notion is woven throughout the LMRDA. Section 401(b) of Title IV indeed requires that local union officers must stand for election "not less often than once every three years". No amount of claimed infringements on free speech rights can insulate union officers from the risks of reelection and if they are voted out of office for expressing opinions contrary to the desires of their constituency, that is a risk of elected office and no denial of Title I rights can validly be claimed. For Title I "protects the union - member relationship but not the union - official relationship." Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir. 1973). Thus, it is undeniable that had the members of Local 676 voted Mr. Russo out of office on April 6, 1974 because his filing unfair labor practice charges with the NLRB had denied the membership the wage increase due them under the April, 1973 collective bargaining agreement, Mr. Russo could not be heard to say the union constituency had infringed upon his rights under Section 101(a)(2). But the membership did not vote Mr. Russo out of office in April, 1974. The claim is that he was voted out of office in December, 1973, in response to his filing of unfair labor practice charges. The issue, therefore, is whether this difference has any legal significance vis a vis alleged denials of rights guaranteed under Section 101(a)(2).

Where local union by-laws provide for recall of union officials by the membership, could it reasonably be argued that the membership could not recall and vote out of office one of its officers for any reason they chose, including their disapproval of his denying them a wage increase through his filing unfair labor practice charges with the NLRB? Clearly, union democracy anticipates that the membership is not so limited in the reasons it chooses to recall and vote out one of its officers. Again, Title I rights would not be violated thereby, for the members have affected only the union-officer relationship. Thus, even assuming Plaintiff-Appellant's factual allegations to be true, all the membership of Local 676 has done is recall Mr. Russo from office in response to their frustration with his conduct depriving them of a wage increase. And Mr. Russo was soundly defeated: 61 to 13 with 9 challenged votes not counted.

It may be that under the local by-laws Mr. Russo can establish a valid state claim that he has improperly been denied the final three months of his term of office as business manager - although it must be emphasized that his complaint alleges no such violation of the by-laws or of the United Association Constitution. Whatever the possible merit of Mr. Russo's future claim in this regard, the union membership has not denied Mr. Russo any rights protected by Section 101(a)(2) by voting him out of office in December, 1973.

This Court's recent decision in Schonfeld v. Penza, supra,

is distinguishable with respect to the holding that a §101(a)(2) claim was made where the complaint alleged that Schonfeld was removed from office by the trial board of the Painters District Council and Schonfeld was declared ineligible to run for office for five years. Initially, Mr. Russo was not prohibited from running for office. He was nominated and was not restricted in any way from campaigning - he sent literature to the members on union stationery and signed this literature as business manager. In every way he took advantage of the electoral process and only after he lost the election did he seek injunctive relief. More importantly, in Schonfeld, supra, the union membership did not remove Schonefeld from office - a trial board of the District Council did. Because of this, the Court looked to the allegation of the Schwartz complaint that such removal "constitutes a form of intimidation of the membership" and of Schonfeld's complaint that his removal from union office was "'an expression of an anti-democratic policy and practice pursued over the past twenty years' which included a policy of 'bringing charges . . . against those who exercise freedoms of speech, press, and assembly in their opposition.' " (477 F.2d at 903). This Court thus concluded that "as we read these allegations, they raise the question whether the sanctions on Schonfeld in the peculiar context of the history of union factionalism present here impede or infringe upon the free speech and association rights of union members protected by §101(a)(2) of Title I . . . ."

(emphasis added)(477 F.2d at 903). Here no allegation in Mr. Russo's complaint raises the question whether free speech rights of members have been impeded. For here the members themselves amended their by-laws by a 44-1 vote and exercised their franchise to remove Mr. Russo from office, not an outside third party or union officials. Moreover, and critically, as Plaintiff-Appellant concedes, there has never been anything approaching a long-standing policy of suppression of free speech within Local 676 - and none is alleged. The membership simply opposed Mr. Russo's conduct in office and turned him out. In short, the "peculiar context of the history of union factionalism" presented in Schonfeld v. Penza simply does not exist here and the invasion of member's Section 101(a)(2) rights "invalid by union officers" in Schonfeld is non-existent here.

This Court in Schonfeld anticipated that plaintiffs would attempt to rely on its decision to avoid the procedures of Title IV by alleging an infringement of free speech rights "every time a political dispute occurs" (477 F.2d at 903). Thus, beyond what has been stated supra, this Court reiterated that it did not wish to "lend credence to any suggestion that the mere appendage of free speech allegations to an election complaint is sufficient to take the case out of Title IV's requirements as interpreted by Calhoon" (477 F.2d at 903). Accordingly, where, as here, union actions allegedly infringe on both Title I and Title IV, the Court stated

it will limit initial federal court intervention to cases where such conduct "can fairly be said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union" (emphasis added) (477 F.2d at 904). Here, arguably, the electors have revolted against the elected, but the electors have not been suppressed in their free speech by union officials. Moreover, as Judge Newman's finding demonstrates"there are no allegations of the type of deliberate and long-standing suppression of free speech within the union that Schonfeld v. Penza, supra, indicated would invoke §101(a)(2) protection" (A. 22).

Regarding Plaintiff-Appellant's reliance on Section 101(a)(5), the simple answer is, as this Court stated in Schonfeld v. Penza, supra, and as has been noted supra, "Title I of the Act protects the union - member relationship, but not the union - official or union - employee relationship and that hence removal from union office gives rise to no rights in the removed official as an official under the Act" (emphasis in original) (477 F.2d at 903, n.6).[11/] Accord, Grand Lodge Machinists

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11/ In Schonfeld v. Penza, supra, a Title I claim was found valid based on Schonfeld's being rendered ineligible from seeking office for that "affects him as a member and permits him to challenge the fairness of the procedures resulting in such political exile" (emphasis in original) (477 F.2d at 904). Of course, here no such basis for jurisdiction under Section 101(a)(5) exists for as noted supra, Mr. Russo was eligible to run for office and did.

v. King, 335 F.2d 340, 342 and n. 7 ("[I]t has been held with virtual unanimity that section 101(a)(5) does not apply to removal or suspension from Union office"); Air Line Steward and Stewardesses Assn. v. Transport Workers Union, 334 F.2d 805 (7th Cir. 1964).

Finally, it must be noted that Plaintiff-Appellant, in his brief, has requested this Court not only to reverse the trial court's decision dismissing the complaint, but also if this Court holds that a Title I claim is not made out to find that the trial court erred in not exercising its pendent jurisdiction to restrain Defendants-Appellees from installing its newly elected officers until such time as the Labor Department and the NLRB terminate their proceedings (Plaintiff-Appellant's Brief, pp. 19-21).

Initially, as Plaintiff-Appellant concedes in his brief at p. 21, a federal district court has pendent jurisdiction to hear state claims only where plaintiff has asserted a substantial federal claim. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Here, however, Plaintiff-Appellant seeks the federal district court to exercise its pendent jurisdiction even where the asserted federal claim is dismissed, as a matter of law, prior to the joinder of the issues and trial of the case by a federal district court. Clearly, this goes beyond the development of pendent jurisdiction in the federal courts and it is questionable whether, as a matter of constitutional power, pendent jurisdiction exists. In any event, Gibbs appears to require dismissal of a state claim if the federal claim, though substantial

enough to confer jurisdiction, is dismissed before trial (383 U.S. at 726). Secondly, even if the federal claim were substantial enough to confer jurisdiction Plaintiff-Appellant has not alleged any state court claim in his complaint or even alleged facts to support a state claim. Clearly, the power to hear a pendent claim must be resolved on the pleadings. United Mine Workers v. Gibbs, supra, 383 U.S. at 727. Indeed, even in its brief Plaintiff-Appellant does not assert a pendent claim. He alleges only that administrative proceedings have been instituted before the NLRB and the Labor Department (Brief, pp. 19-21). Finally, in Gibbs, supra, the Supreme Court made clear that the exercise of pendent jurisdiction is within the discretion of the trial court and it should look to the "considerations of judicial economy, convenience, and fairness to litigants" in exercising its discretion (383 U.S. at 726). However, Plaintiff-Appellant alleges no abuse of discretion here.

In these circumstances, we submit, the court below properly refused to grant the Plaintiff-Appellant relief based on pendent jurisdiction.

CONCLUSION

For the above stated reasons, we respectfully request this Court to deny the appeal of the Plaintiff-Appellant in this

matter and affirm the decision of the federal district court dismissing Plaintiff-Appellant's complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief Of Appellees has been sent by first class mail, postage prepaid, this 21st day of February, 1974, to the following:

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